THE EXISTENCE OF LEGISLATION AND A LEGISLATIVE PROCESS IN INTERNATIONAL LAW

1. INTRODUCTION

Ubi societas ibi jus est. It is a well known truism that law is a social phenomenon and ought to be interpreted or explained against the background of the social conditions which bring it into existence. In other words it is the nature of a society which determines the character of its laws as well as the processes which go to enact them.[1] The point can be illustrated by a reference to the legal systems obtaining within national societies, for there is great variation from one State to another in the processes by which legislation is enacted. Thus it is only through a proper study of the distinctive characteristics and needs of modern international society[2] that we can best understand the true nature and function of international law as well as the nature and function of the processes by which the conscious enactment or codification of its rules is achieved.

When we compare international society with the national society we find that the similarities between the two are very few. They both happen to be organized associations[3] which attempt to promote peace and welfare amongst their members. If State society can be defined as an organized association of human beings, international society can

1. In the words of J. L. Brierly "the character of the law of nations is necessarily determined by that of the society within which it operates and neither can be understood without the other"—*The Law of Nations* (1950), p. 42. Also see Niemeyer, G., "International law and social structure", *A.J.I.L.* (1940), vol. 34, p. 588; Schwarzenberger, G., *The Frontiers of International Law* (1962), p. 21, *et seq.;* Falk, R.A., "The adequacy of contemporary theories of international law — gaps in legal thinking", *Virginia Law Review* (1964), vol. 50, p. 233 *et seq.*

2. The term 'society has been used in its ordinary sense; no technical meaning has been assigned to it. For a general discussion on the question of the distinction, which has been drawn by certain writers, between the terms 'society' and 'community', see generally Corbett, P.E., *Law and Society in the Relations of States* (1951), pp.11 and 75; ——, "Social basis of the law of nations" *Recueil des Cours* (1954), vol. 85, pp. 471 and 477; Keeton, G. W. and Schwarzenberger, G., *Making International Law Work* (1939), pp. 28-31; Stone, J., *Legal Controls of International Conflicts* (1954), p. xlix *et seq.;* ——, "Problems confronting sociological enquiries concerning international law", *Recueil des Cours* (1956), vol. 89, p. 129 *et seq.*

3. Conceding that there is a vast difference in the degree of organization, it is now possible to speak of part of international law as a "law of international organizations".

be described as an organized association of States and other subjects of international law. It is true that the extent to which it is organized is debatable but it is far from being a totally primitive society.[4] During the last hundred and fifty years it has registered remarkable progress: from a primitive stage of global anarchy, it can be said to have at least attained some kind of institutional federalism. Today, there are in existence an International Court of Justice, many international organizations with their own international civil services headed by a Director-General or a Secretary-General (who in the case of the U.N. exercises political functions and executive powers on the international plane), and a system of highly organized conferences meeting as part of or independently from the international organizations. The international courts have given us a good deal of judge-made law and have been instrumental in successfully deciding cases which might otherwise have led to open hostilities between nations. The United Nations has intervened in Korea, the Middle East, the Congo and Cyprus to bolster up the rule of law and, though to some people these attempts to establish the rule of law within the international sphere have not appeared spectacular, such positive attempts on the part of the United Nations have at least fully established the possibility that executive power can be handled and exercised internationally. The process of codification and progressive development of international law as initiated by the General Assembly of the United Nations through the International Law Commission is a positive step towards organizing the legislative function of the community of States in a tangible form.

But here the similarities end and the differences begin. In fact, international society is vastly dissimilar in comparison with the smaller and more compactly organized State society, so much so that the dissimilarities far outweigh the few similarities between the two.[5] The general homogeneity of traditions and culture which goes to provide the bond of national ties for people within a State society is non-existent in international society. There being no common cultural traditions to bind the States or peoples throughout the world, we are far from having that cohesion among the members of international society which is found within the State society. Moreover, national outlook helps to foster an unflinching faith in State particularism. The result is that even in organized associations like the United Nations, the member States tend to retain their individualistic approach on common problems. This also accounts for the looseness of the Society of States; 'federalism' is impossible and there is little connection between international law and the individual within the State. Another difference

4. As pointed out by Friedmann "modern international society,... is primitive only in the degree of the subordination of states to a common rule of law. It is far from primitive in the ability and habit to discuss, exchange and formulate rules of conduct. The highly articulate character of modern international society finds expression in the existence of numerous official, semi-official and private bodies engaged in the elaboration, restatement and reform of international law"—*The Changing Structure of International Law* (1964), p. 135.

5. For a detailed discussion on this subject see Brierly, J. L., *The Basis of Obligation in International Society* (1958), pp. 250-264.

worth emphasizing is that international society is composed of relatively few members as compared with the State society which is composed of millions of members. Moreover, being organized on the basis of voluntary and mutual co-operation, its systems, processes and procedures inevitably reflect that basis. The State society, on the other hand, is run on the principle of subordination of the individual to the State and is highly organized. Furthermore, the individuals within the State society are far weaker in comparison with the States who on account of their enormous power are not likely to be easily compelled to accept obligations which run counter to their interests.

It follows from what has been said above that the legislative process [6] within international society is not likely to follow the same course or the particular form which it follows within the State society even though in both spheres — the municipal and the international — it serves the same purpose of providing a community with rules for governing the conduct of its members. Obviously the main reason for this is the markedly different character of the two societies.

Law as a deeply felt social necessity, as distinct from arbitrary or dictatorial commands, comes into existence in response to the felt necessity within the society. It is possible that the necessity may not be of an all-pervading nature requiring an effective action for the whole society through some sort of a centralised legislative body; the need may at any particular moment be felt only by a few members and within international society this has been more often the case than not, so that rules of international law cannot reasonably be expected to emanate only from a parliament created for the whole society or a determinate sovereign authority. Rather, in keeping with the character of modern international society, these rules are more likely to grow through regional councils, international organizations or conferences of States, the very existence of which evidences a common need or interest, and in which, commensurate with their pressing needs, the States may decide to legislate for themselves. These rules may at first be accepted within a smaller circle of States but after their usefulness is tested in practice, they may become part of the general law. In this context, it is not very surprising to find that there is no paramount legislative body within modern international society or that the legislative function stands distributed among and exercised through several international conferences and assemblies, relying largely upon voluntary co-operation by States in the promulgation of law rather than upon the subordination of States to the enactments of a sovereign legislative body.

6. The term 'legislative process' is a phrase which, in municipal law, is meaningful largely by reference to an established legislature; it is the existence and mode of operation of this body which conditions our whole approach to the definition of the term. Yet, clearly, primitive societies ante-dating the modern national state possessed a 'legislative process' without possessing any institution truly comparable to the modern national parliament. Similarly, present-day international society possesses a legislative process without a sovereign international legislature.

Within international society States are regarded as legal persons. They are competent not only to regulate the relations among individuals within the municipal sphere but they have also the capacity to regulate their own behaviour by providing themselves with a constitution or by making a treaty. So, if the States mutually agree to create binding rules of conduct in conferences, international assemblies or councils which impose obligations upon them severally and jointly, they are, in doing so, in effect legislating for their own needs as well as for the common needs of a larger community which all of them represent. As rightly pointed out by Dicey, when a body of individuals "bind themselves together to act in a particular way for some common purpose, they create a body which by no fiction of law but by the very nature of things differs from the individuals of whom it is constituted".[7]

2. THE MEANING OF THE TERMS 'LEGISLATION' AND 'LEGISLATIVE PROCESS' IN MUNICIPAL SYSTEMS

The tendency has been to define legislation in municipal law not so much by reference to its content as to the process by which the rules of law are enacted: the notions of 'legislation' and 'legislative process' have, therefore, been regarded as inseparable.

(a) *The nature and function of 'legislation' within the State societies*

Within the State society we find two distinct and important means whereby the 'common consent' of the society is expressed, e.g. custom and legislation.[8] In the development of custom we find a process common to both the state societies and international society whereby legal rules grow slowly from precedents and established usages. But, on the other hand, *legislation* is said to be the product typical of the State

7. Dicey, A. V., "The combination laws as illustrating the relation between law and opinion in England during the nineteenth century", *Harvard Law Review* (1903-1904), vol. 17, p. 513.

8. The term 'legislation' ordinarily means 'law-making'. The *Oxford English Dictionary* defines it as 'The action of making or giving law'; 'the enactment of law'; 'law-giving'. Jowitt's *Dictionary of English Law* defines the term as 'the making of law' and 'any set of statutes'. Its Latin equivalent from which it is derived appears to be 'legislation-em' *(legis,* genetive of *lex,* law + *lation-em,* bringing). Similarly, legislator, another derivative from Latin is composed of two Latin words *(legis,* genetive of *lex,* law + later, used as agent to carry, bear, bring). The Greek word *nomos* appears to be closer to the meaning which we associate with the term. *Leges, lex, loi* and *gesetz* are the other words which have been used in Latin, French and German to denote the enacted rules having a general application, but the word 'legislation' (with the meaning in which we use the term) appears earlier in French than in English use. For the use of the word in French, see *Littre's Dictionary.*

For a systematic bibliography on 'legislation', see Pound, R., *Outlines of a Course in Legislation* (1934).

society.[9] In contrast to custom it involves law-making in a direct and expeditious manner. It is more the manner or procedure of enacting the rule which distinguishes legislation from custom; indeed, so far as the content of the rule is concerned there may be no difference, and much legislation in both the municipal and the international sphere is concerned with the codification of existing customary law. Once codified the rule derives its normative character from the fact of its promulgation in the prescribed manner and by the recognized procedure: a court will, from the evidential point of view, look to that alone rather than to the kind of proof necessary to establish the normative character of an alleged customary rule.

3. CONTRASTS BETWEEN THE TERM 'LEGISLATION' AS USED IN THE INTERNATIONAL AND MUNICIPAL SYSTEMS

Allen has pointed out that municipal legislation possesses the following important attributes:[10] it is general and comprehensive in form; compared to a judicial decision which "exists primarily for the settling of a particular dispute, a statute purports to lay down a universal rule"; it may be created for the first time, "or it may, if of a declaratory or consolidating kind, weld existing and possibly conflicting rules into a compendious form"; it may operate with prospective or retrospective effect; it has a "power of self-criticism and self-revision which precedent can exercise only indirectly and in a subordinate degree"; and finally, that it has the possibility to abrogate all laws having currency within a community subject to its jurisdiction. In this light then, the fact that the law-making treaties have been able to create, declare, codify, amend, and abrogate rules of international law seems sufficient to invest them with legislative character. Treaties, in direct contrast to custom and judicial decisions, provide an expeditious mode of action for creating rules of international law within international society. The fact that the development of international law as a whole has been greatly quickened and facilitated by treaties is indisputable. Law-making treaties can also be favourably compared with municipal statutes on several other grounds, e.g., in their use of imperative language; in the method of designating rules by different articles, sections or sub-sections etc.; in the care which is generally taken in drafting their contents; in the use of appropriate, precise and unambiguous words; in their being formal declarations of what the law is.

9. Sir C. K. Allen defines legislation as "the characteristic law-making instrument of modern societies expressing a relationship between the individual and the state" or again, "the characteristic mark of mature legal systems, the final stage in the development of law-making expedients." See *Law in the Making* (1958), pp.140 and 590.

   Benjamin Akzin, after examining most of the definitions of the term 'legislation', reached the conclusion that a comprehensive and proper definition of the word was not possible — see "The concept of legislation", *Iowa Law Review* (1935-36), vol. 21, pp. 713-750. This difficulty arises partly because 'legislation' involves intricate and complex series of procedures and does not simply represent the ultimate "public commitment symbolized by the vote". Furthermore, as pointed out by H. Eulau this process cannot also be described in terms of "a step-by-step procedure to translate a bill into law" as each phase of the legislative process is ... not a sharply differentiated time unit" — see "introductory remarks" in *The Legislative System* (1962), edited by John C. Wahlke, pp. 237-244.

10. *Op. cit.*, p. 409.

McNair shares with Allen the view that legislation has a primary characteristic of laying down rules of universal application. He says: "The essence of legislation is that it binds all persons subject to the jurisdiction of the body legislating whether they assent to it or not. International legislation does not".[11]

This observation raises an important question. What is the essence of legislation ? Or, can we say that the law-making function within a society ceases to result in 'legislation' simply because it does not lay down rules which may bind *all* of its members ? The answer is obviously no. The essence of municipal legislation does not lie in the fact that it binds all but that it *can* bind all; we know full well that legislation within municipal societies, at times, binds only a section of the community, or a small group of persons, or even a single individual. Hence, the distinction between the Private and the Public Act in English law. Decidedly there exist possibilities within the scope of the conscious law-making activity in international law to lay down such rules as may bind all the members of international society.

Multilateral treaties like those creating the Universal Postal Union or the International Telecommunication Union, or like the Covenant of the League of Nations or the U.N. Charter, do present a picture of international legislation in a general and comprehensive form.[12]

If it is agreed that the U.N. Charter is a 'legislative act' binding on all, which indeed, within limits, it is,[13] there is ample justification for the view that the law-making function within international society can also be so directed as to bind all its members, but for reasons peculiar to international society, excepting rare cases, such a procedure is neither resorted to nor considered expedient or desirable. In Article 2(6) of the U.N. Charter there is the clear statement of the possibility of the United Nations ensuring that even non-members accept and abide by certain of the rules contained in the Charter. So that the difference between the municipal and the international legislation is, again, a difference of degree rather than kind.

As regards the creation of new rules of conduct, international legislation in the nineteenth and twentieth centuries has been nothing short of remarkable and has covered subjects as wide and varied as these: humanization of warfare; amicable settlement of disputes; transport and communication by road, rail and sea; conservation of marine re-

11. McNair, A.D., "International legislation", *Iowa Law Review* (1933-34), vol. 19, p. 178; ——, *The Law of Treaties* (1961), p. 730.

12. It cannot be denied that the scope of the conscious law-making activity within international society stands seriously limited; however, rules of universal application have been created by treaties on numerous occasions. For a detailed discussion of the role of treaties in creating or establishing rules of international law see Singh, N. N., *The Legislative Process in International Law,* unpublished doctoral dissertation, Cambridge University (1964), Chapter 8.

13. Here reference need only be made to para. 6 of Article 2 of the UN Charter. The UN has been clearly authorized to ensure that even those States "which are not members of the United Nations act in accordance with the principles of the UN Charter so far as may be necessary for the maintenance of international peace and security". See generally Falk, R. A., *The Authority of the United Nations to Control Non-Members* (1965), Centre of International Studies of Princeton University, Research Monograph No. 18.

sources; maritime law; telecommunications and postal correspondence; safety of life at sea; allocation of radio frequencies; sanitation and hygiene; copyright; labour; nationality laws; transmission of electric power; genocide; refugees; forced labour and slavery; agriculture; fisheries; industrial property; inland waterways; patents and trademarks; weights and measures; liquor traffic in Africa; custom formalities; narcotics and dangerous drugs; diplomatic and consular relations; education and culture; information and broadcasting; economic statistics; health; arbitration; international trade; human rights; space law and so on.

Conscious law-making activity in international law has also led to the codification [14] and restatement of its existing rules [15]; various codificatory conventions including those adopted at the Hague Conferences

14. However, it must be pointed out that the concept of 'codification' does not refer to a mere systematization of the existing rules regardless of the fact whether they are just or unjust, satisfactory or unsatisfactory and applicable or obsolete; it also denotes an amending and improving process.

15. See the Secretariat memoranda prepared in 1947 on: Methods for encouraging the Progressive Development of International Law and Eventual Codification, A/AC. 10/7; Methods for Enlisting the Cooperation of Other Bodies, National and International, Concerned with International Law, A/AC. 10/22; the Codification of International Law in the Inter-American System with Special Reference to the Methods of Codification, A/AC. 10/8; the Memorandum of the Secretary-General on the Survey of International Law in Relation to the Work of Codification of International Law, A/CN. 4/1/Rev. 1 (1949). Of special importance are Summary Records of the Committee on the Progressive Development of International Law and its Codification, A/AC. 10/SR (1947); Secretariat Memoranda on Historical Survey of Development of International Law and its Codification by International Conferences, A/AC. 10/5 (29 April 1947); Bibliography on the Codification of International Law, A/AC. 10/6 (2 May 1947).

Also see generally Baker, P. J., "The codification of international law", *B.L.I.L.* (1924), vol. 5, pp. 38-65; Hughes, C. E., "The development of international law" in *Codification of American International Law* (1926), p. 6; Brierly, J. L., "The future of codification", *B.Y.I.L.* (1931), vol. 12, pp. 1-12; Hurst, C., "A plea for the codification of international law on new lines", *T.G.S.*, vol. 32, pp. 135-153; Jennings, R. Y., "The progressive development of international law and its codification", *B.Y.I.L.* (1947), vol. 24, pp. 301-329; Potter, P. B., "Crucial problems in the development and codification of international law", *A.J.I.L.* (1947), vol. 41, pp. 631-634; Alvarez, A., "The reconstruction and codification of international law", *The International Law Quarterly* (1947), vol. 1, p. 469; Yuen-li-Liang, "The General Assembly and the progressive development and codification of international law", *A.J.I.L.* (1948), vol. 42, pp. 66-97;—, "Le developpement et al codification du droit international" *Recueil des Cours* (1948), vol. 73, pp. 411-527; Lauterpacht, H., "Codification and development of international law", *A.J.I.L.* (1955), vol. 49, pp. 16-43; Honig, F., "Progress in the codification of international law", *International Affairs* (1960), pp.62 *et seq.;* Wyzner, E., "Selected problems of the United Nations program for the codification and progressive development of international law", *P.A.S.I.L.* (1962), pp. 90-99; for a highly critical and thought-provoking view that ill-conceived codification can be a retrograde step, see Baxter, R. R., "The effects of ill-conceived codification and development of international law" *Recueil d'Etudes de Droit International* (en Hommage a Paul Guggenheim—1968), pp. 146-166; Hazard, J. N., "Codification of peaceful coexistence" *Boletin Mexicano de Derecho Comparado* (1968), vol. 1, pp. 185-196; Tricaud, M., "Report on the codification of the rules of international law that could serve as the basis for a world code of law" in *Proceedings of the 1967 Conference on World Peace through Law* (Geneva, 1969), pp. 476-483; Briggs, H. W., "Reflections on the codification of international law by the International Law Commission and by other agencies", *Recueil des Cours* (1969), vol. 126, pp. 233-316; Dhokalia, R. P., *The Codification of Public International Law* (1970).

of 1899 and 1907, or those adopted at the Geneva Conference on the Law of the Sea, 1958 can be cited to illustrate the point.

Conscious law-making activity in international law has more often resulted in laying down rules which come into force with prospective effect, but there is nothing to prevent it, if the legislating body so chooses, from prescribing rules intended to come into force with retrospective effect, though as a rule retrospective legislation is not resorted to even within the State society.

Just like municipal legislation, international legislation undergoes 'revision' and amendment. For instance, all the Conventions adopted at the Hague Conference of 1899 were completely revised and adopted in an amended form at the Second Hague Conference in 1907. The revision and amendments of the constitutional texts of international organizations provide us with many more examples of the so-called power of 'self-criticism' which has been called, by Allen, an important characteristic of municipal legislation.[16]

Finally, the conscious law-making activity in international law has also the capacity to abrogate all or any of the rules having currency within international society or to supersede them by new laws. The Declaration of Paris, 1856, by declaring privateering to be illegal, virtually invalidated the established practice of issuing 'letters of marque and reprisal'. Only fifty years ago war was considered a legitimate instrument of national policy, and a legal means of settling international disputes. But today, in view of the Kellogg-Briand Pact and the United Nations Charter, war as an instrument of national policy cannot be justified in legal terms any longer.

These illustrations of the similarity in the results obtained by the law-making activity within both the international and the municipal spheres establish the point that in principle "the full function of international legislation differs in no way from that of legislation within the State".[17]

16. For a general discussion of amendment procedures, see Schwelb, E., "The amending procedures of constitutions of international organizations", *B.Y.I.L.* (1954), vol. 31, pp. 49-95.

For *a* distinction between 'revision' and 'amendment' and the role of 'legislative principle' in the amendment procedures of international organizations, see Bowett, D. W., *The Law of International Institutions* (1963), pp. 329-332.

See also, Hoyt, E. C., *The Unanimity Rule in the Revision of Treaties* (1959), generally.

17. Brierly, J. L., *The Basis of Obligation in International Law* (1958), *p. 222.*

Also see Knudson, J. L, *A History of the League of Nations* (1938), at p. 195 where he compares national legislation with international legislation in the following terms: "Legislation suggests the power of a superior command of which the State is the highest unit. Yet it need not be a command at all, for it is more nearly to be regarded as the enactment of rules between equals respecting those principles and interests that are to govern their relationships. Domestic legislation concerns itself with agreements among individuals, while international legislation relates to agreements between States. To effect such agreements it is not necessary that there should be a superior power, a permanent legislative body, established procedure, or a central enforcement agency. The initiation and the giving of effect to legislation is a sufficient test of its validity."

4. Conscious law-making activity in international law and the use of the term 'legislation' to describe this process

The word 'legislation' in connection with the role of law-making treaties was used as early as 1898 by Holland. According to him, "treaty-making on a large scale is the only substitute for legislation available to a group of independent political communities".[18] Writing in the year 1907, Moore stated[19] that "the past century has been specially distinguished by the modification and improvement of international law by what may be called acts of international legislation" and illustrated his point by referring to the law-making provisions of the Treaty of Vienna, 1815, Protocol of Aix-la-Chapelle, 1818, Declaration of Paris, 1856, and the conventions concluded at the First Hague Conference in 1899. According to him international law could be developed in two ways only: "The first is the general and gradual transformation of international opinion and practice; the second is the specific adoption of a rule of action by an act in its nature legislative". Shortly afterwards, Oppenheim devoted one full chapter of his monograph, entitled *Die Zukunft des Völkerrechts* (1911), to the subject of *international legislation.* Since then the term 'international legislation' has been increasingly used to describe the role of the multilateral or 'law-making treaty' in laying down either general principles or substantive rules of international law.

Thus, the term 'international legislation' has been known to us, by now, for more than seventy years; over these years it has been used by a very large number of writers. For example, it has been used by Hudson,[20] McNair,[21] Gihl,[22] Garner,[23] Scelle,[24] Eagleton,[25] Dunn,[26]

18. Holland, T. E., *Studies in International Law* (1898), p. 82; —, *Lectures on International Law* (1935), p. 30.

    Also see Dunn, F. S., "International legislation", *Political Science Quarterly* (1927), vol. 42, at p. 572 where he says that the term 'legislation' was used in this sense by Holland as early as 1876; there being no reference to any source the statement could not be verified by the writer.

19. Moore, J.B., "International law: its present and future", *A.J.I.L.* (1907), vol. 1, pp. 11-12.

20. Hudson, M. O., *International Legislation* (1931), vol. 1, pp. xiii-lx.

21. McNair, A. D., "International legislation", *Iowa Law Review* (1933-34), vol. 19, pp. 177-189.

22. Gihl, T., *International Legislation* (1937).

23. Garner, J. W., *Recent Developments in International Law* (1926), p. 600 *et seq.*

24. Scelle, G., "Regies generales du droit de la paix", *Recueil des Cours* (1933), vol. 46, pp. 331-693.

25. Eagleton, *C*., *International Government* (1957), pp. 183-209.

26. Dunn, F. S., "International legislation", *Political Science Quarterly* (1927), vol. 42, pp. 571-588.

Knudson,[27] Buell,[28] Potter,[29] Mower,[30] Brierly,[31] Lauterpacht,[32] Erler[33] and many others,[34] though sometimes with different meanings.[35]

From among these writers Torsten Gihl has used the term 'international legislation' in a special sense. In Gihl's opinion:

> 'International legislation' is not the business of courts but of States, and the States can develop new rules of customary law by observing these rules in their actions, without the support of any agreement, or they can also adjust their mutual relations by means of agree-

27. Knudson, J. I., *Methods of International Legislation* (1928), pp. 1-137.

28. Buell, R. L., *International Relations* (1926), chapters xxvii to xxviii.

29. Potter, P. B., *A Manual of Common International Law* (1932), p. 190; ——, *An Introduction to the Study of International Organizations* (1948), p. 209.

30. Mower, E.C., *International Government* (1931), pp. 152-153, 155-156, 267-270, 275-276, 283-289.

31. Brierly, J. L., *The Law of Nations* (1950), pp. 87-90; see also "The legislative function in international relations", *The Basis of Obligation in International Law* (1958), pp. 212-229.

32. Lauterpacht, H., *The Function of Law in the International Community* (1933), p. 250.

33. Erler, J., "International legislation", *C.Y.I.L.* (1964), vol. 2, pp. 153-163.

34. See generally, Fenwick, C. G., "Problems connected with the development of international law, international legislation and codification", *P.A.S.I.L.* (1923), pp. 49-52; Keen, F. N., "World legislation", *T.G.S.*, vol. 16, pp. 49-52; Briggs, H. W., "The United Nations and international legislation", *A.J.I.L.* (1947), vol. 41, pp. 433-435; Dean, W. T., "International legislation", *A.B.A.J.* (1947), vol. 33, pp. 878-881, 962-964; Jackson, S. W., "International legislation", *ibid.* (1948), vol. 34, pp. 206-209; Jessup, P.C., *A Modern Law of Nations* (1948), pp. 91, 133-135; Jones, H. H., "Amending the Chicago Convention and its technical standards", *The Journal of Air Law and Commerce* (1949), vol. 16, p. 194; Engel advocates that the United Nations Secretariat should assume the functions of an "International Civil Registry for International Legislation", in "On the status of international legislation", *A.J.I.L.* (1950), vol. 44, pp. 737-739; Kelsen, H., *Principles of International Law* (1952), p. 321 *et seq.;* Jenks, C. W., in *B.Y.I.L.* (1952), vol. 29, p. 106 *et seq.*, where he assigns the character of 'international legislation' to law-making treaties; Vallat, F. A., "Law in the United Nations", *A.R.U.N.A.* (1953), p. 145; Stone, J., *Legal Controls of International Conflict* (1959), pp. 19-25; Schwarzenberger, G., *The Frontiers of International Law* (1962), pp. 288-296; Waldock, H., "General course on public international law", *Recueil des Cours* (1962), vol. 106, pp. 99-100; Whitaker, U. G., *Politics and Power* (1964), pp. 115-119; Cohen, M., "'Basic principles' of international law — a revaluation", *Candian Bar Review* (1964), vol. 42, p. 451 *et seq.;* Friedmann calls the international treaty "the nearest substitute to international legislation", *The Changing Structure of International Law* (1964), p. 124; Seyersted, F., "Jurisdiction over organs and officials of States, the Holy See and intergovernmental organizations (1)", *I.C.L.Q.* (1965), vol. 14, pp. 31 *et seq.*, 52-62; Skubiszewski, K., "Enactment of law by international organizations", *B.Y.I.L.* (1965-66), vol. 41, pp. 198-201; Quincy Wright, *Contemporary International Law: A Balance Sheet* (1966), p. 35 *et seq.;* Holloway, K., *Modern Trends in Treaty Law* (1967), pp. 580-581; Jacobini, H. B., *International Law: A Text* (1968), pp. 145-198.

35. That the term 'international legislation' has been used in a very wide sense by some writers see Schultz, G., *Entwicklungsformen Internationaler Gesetzgebung* (1960), pp. 5-10, 198, note 1.

> ments, whose rules certainly are only binding upon the contracting parties, yet which nevertheless, if they correspond to the demands of international life, will come to be applied also by States which have not subscribed to the agreements, and thus give rise to international customary law, which alone constitutes international law.
>
> Only this method for the development of law — which can, be it noted, very well exist in a system of assured world peace — can be called international legislation in the real sense of the term.[36]

Thus, according to Gihl the term 'international legislation' can only cover the growth of customary rules of international law, or, those rules which, though enacted in treaties, are later on transformed into customary law. This, it is believed, is an extremely restrictive view which cannot be defended when we take into account multilateral treaties like the United Nations Charter or the 1949 Geneva Conventions.

Scelle's description of 'collective legislation' is very near to our notions concerning 'municipal legislation'. In his opinion, lawmaking treaties do not envisage parties and third parties but only legislators and the subjects of the intended legislation.[37]

However, in marked contrast to both Gihl and Scelle, Potter has been much more realistic in defining 'international legislation' "as the enactment of international law by formal action of less than unanimous consent".[38] He has further, and rightly, pointed out that the "essence of international legislation is the synthesis of national policies in any given matter, the formulation of international policy, and its adoption as international law".[39]

But a very large majority of writers use the term as a convenient expression or as a 'metaphor'[40]: while these writers are no doubt prepared to accept the law-making role of treaties and use the term 'international legislation' to denote such legislative role of treaties they also tend to qualify their use of the terms 'legislative' and 'international legislation'. For instance Hudson has very clearly stated that while the term "international legislation would seem to describe quite usefully both the process and the product of the conscious effort to make additions to, or changes in, the law of nations", the "analogy to national legislation is not perfect and it cannot be pressed too far … the term is a convenient one for designating the introduction of law governing the relations of States, though there exists in the world of States no single

36. *Op. cit.,* p. 151.

37. *Op. cit.,* p. 437 *et seq.*

38. *Op. cit.,* p. 209.

39. *Ibid.,* p. 210.

40. See generally, Hudson, M. O., *op. cit.*, pp. xiii-ix; McNair, A. D., *op. cit.*, pp. 177-189; Lauterpacht, H., "The Covenant as the higher law", *B.Y.I.L.* (1936), vol. 17, p. 54; Fenwick, C. G., *International Law* (1948), p. 32; Alexandrowicz, C. H., *World Economic Agencies* (1962), p. 14; Erler, *op. cit.*, pp. 155-156; Fawcett, J. E. S., *The Law of Nations* (1968), p. 97 *et seq.*

    Some writers indicate their preference for the term 'quasi-legislation' — see Erler, *op. cit.*, p. 156; Saba, H., "L'activité quasi-legislative des institutions spécialisées des Nations Unies", *Recueil des Cours* (1964), vol. 111, p. 607-686.

body which is in every respect comparable to any national legislature".[41] Similarly, while McNair has stated that the multipartite treaties "vie with the internal legislation in the provision and detail of the rules which they lay down" he has also qualified his use of the term 'international legislation' by observing that it is a 'metaphor' and that "the use of metaphors in an exact science is nearly always a source of danger"[42]. The objection of these writers to the use of the term, except when used as a 'convenient' expression, is based mainly on the argument that as a rule no obligation can be imposed on a State unless its consent has been obtained or given either specifically or in some indirect manner. But this argument is not satisfactory; it is even misleading to a certain extent as it represents a highly oversimplified statement concerning the rules governing the validity of obligations in general under international law. For instance, all it says or emphasizes is that "*no obligation* can be imposed on a State...." But then it clearly ignores the vital distinction between the establishment or imposition of *contractual obligations* on the one hand and the establishment or imposition of *normative obligations* on the other. It is no doubt true that the consent of each State party to a contract can be rightly regarded as vital and necessary. But surely the consent of *each* State has never been regarded as necessary for the creation or establishment of normative obligations under international law. If that had been the case there would have been no international law to begin with. Thus for the purposes of making a more accurate statement concerning the law governing the rise of obligations under international law one must first distinguish between 'contractual' and 'normative' obligations, as their validity is governed by two different principles. It is only when we are talking of contractual obligations that the rule that "no obligation can be imposed on a State unless its consent has been obtained or given" makes any sense. In connection with normative obligations it makes no sense at all because the validity of normative obligations can never be properly explained by reference to the principle of individual consent — it can be explained only by a reference to the principle of common consent.[43] Clearly if we adopt this approach there can be no serious or sensible objection to the use of the term 'international legislation' in international law. However, more than anything else, it is very disconcerting to note that the term, although known to us for the last seventy years or so and despite the fact that of late it has been used by almost every writer on international law, should still be regarded as a 'metaphor' or as a source of danger. Today the objection that 'international legislation' is not 'municipal legislation',[44] which indeed it is not, is meaningless. The adjective 'international' before legislation clearly specifies what it says and there is no reason for apologizing or criticizing that international legislation is not what

41. Hudson, M. O., *op. cit.*, p. xv.

42. McNair, A. D., "International legislation", *Iowa Law Review* (1933-34), vol. 19, p. 178.

43. See Singh, N. N., "The absence of international legislature and its consequences for international law", *Malaya Law Review* (1970), vol. 12, p. 283 *et seq.*

44. See Stone, J., "On the vocation of the International Law Commission", *Columbia Law Review* (1957), vol. 57, p. 16.

in municipal law is known as 'legislation'. Like any other technical term of art or science the term 'international legislation', which has come to acquire a specific meaning because of its extensive use by writers, should be regarded as a technical expression of internationol law.[45]

5. THE EXISTENCE OF A LEGISLATIVE PROCESS IN INTERNATIONAL LAW

Apart from Torsten Gihl who uses the term 'international legislation' to indicate a process whereby customary rules of international law grow, it is generally used to indicate the role of law-making treaties in making additions to or changes in the law of nations. In other words the use of the term generally denotes the attempts made and the results achieved in the field of conscious law-making within international society. Although there is a hestitation among most of the writers to use it literally, they do not however deny the existence of a 'legislative process'; on the contrary most of the writers seem to confirm its existence.[46] Here reference need only be made to some of the more important statements like these:

> ... the processes which lie behind the formal culminating act of legislation within the State are, in modern conditions more important than the act itself, and they have already begun to be organized in international life....[47]

or,

> ... although the society of states has made no attempt to create an international legislature it is making an increasing use of a legislative process by means of the multipartite treaty.[48]

or again,

> The term 'international legislation' is used with increasing frequency to describe treaties and conventions, chiefly those of a multilateral nature, which are adopted by states in order to codify in definite form the rules of law which they follow in their relations

45. That some international organizations, in certain restricted fields, are now exercising true 'legislative' powers has also been emphasized by many writers, so that the term 'international legislation' is not necessarily always a mere convenient expression. See Yemin, E., *Legislative Powers in the United Nations and Specialized Agencies* (1969).

46. See generally, Dunn, F. S., op. *cit.*, p. 585; Baker, P. J., "The codification of international law" *B.Y.I.L.* (1924), vol. 5, pp. 52-58; Castañeda, J., "The underdeveloped nations and the development of international law", *I.O.* (1961), vol. 15, pp. 38-48; Kaplan and Katzenbach, "Law in the international community", in *Legal and Political Problems of World Order* (1962), edited by Saul H. Mendlovitz, p. 87; Jessup, P. C., "Diversity and uniformity in the law of nations", *A.J.I.L.* (1964), vol. 58, at p. 357 distinguishes 'codification process' from the "legislative-conference method"; Coplin, W. D., *The Functions of International Law* (1966), pp. 102-104, 163; Holcombe, A. N., *A Strategy of Peace in a Changing World* (1967), pp. 260-273, 293-294; Jacobini, H. B., *International Law: A Text* (1968), p. 146; Yemin, E., *Legislative Powers in the United Nations and Specialized Agencies* (1969); Heliliah Bte. Yusof, "The impact on international law and relations of the 'legislative' activity by the General Assembly", *Singapore Law Review* (1970), vol. 2, pp. 216-226.

47. Brierly, J. L., *The Basis of Obligation in International Law* (1958), p. 226.

48. McNair, *op. cit.*, pp. 185-186.

> *inter se,* or more often, to make changes in or additions to the existing law which they will adopt in their mutual relations. Despite differences from the legislative process within the modern state, the term is convenient and suggests the analogy between the making of international agreements for this purpose and the making of law within the state; this is useful and desirable, so long as one is aware of the differences between these two types of 'legislative' processes.[49]

McClure has defined the terms 'legislation' and 'legislative process' by referring to

> deliberate law-making through political institutional processes, as contrasted with the growth, recognition, and development of custom by tribunals concerned primarily with interpretation and application of already existing law. International legislation is usually completed by the acceptance or ratification, by the respective peoples' national governing agencies, of measures previously adopted in conferences of the representatives of peoples and is applicable only to those peoples who thus complete the process. While no people has to accept as a matter of supranational law an international act (treaty), this fact in no sense implies a right to cease to obey it or to withdraw from its obligation once it is in force, except in accordance with its terms or by consent of the other accepting peoples — that is, repeal in accordance with law. This characteristic is seemingly decisive of the legislative or law-creating quality of the international measure. The process consists substantially of its adoption, by duly constituted representatives of peoples, usually in a single-chamber congress, which is completed by the acceptance of the head of the state and the legislative body in the national governments of the peoples represented. Such process seems not very strikingly different from adoption by a bicameral national congress with executive approval.[50]

Falk also speaks of a legislative process at work in rudimentary form in international society.[51] Thus, on the whole, there appears sufficient evidence in the writings of some of the leading writers to warrant a belief in the existence of a legislative process in international law.

6. CONCLUSION

In its widest sense and meaning the legislative process within a society would seem to include all the three different modes (custom, legislation and judicial legislation) whereby law is created, defined, amended or even abrogated, but the development of law by custom or judicial decisions at one stage within a society always becomes supplementary to the conscious law-making activity and, it appears, modern in-

49. Bishop, W. W., *International Law: Cases and Materials* (1953), p. 25.

50. McClure, W., *World Legal Order* (1960), p. 212.

51. See Falk, R. A., "On the quasi-legislative competence of the General Assembly", *A.J.I.L.* (1966), vol. 60, pp. 782-791.

ternational society has now reached the stage when it fulfils its legislative needs chiefly through the conscious enactment of the rules of international law in international conferences, assemblies, and councils. If we look at Article 38 of the Statute of the International Court of Justice, the primacy of international conventional law over the customary international law or the judicial decisions stands implicit in the order in which the sources of law are there stated. Moreover, the role of custom in a modern or progressive society is nearly always of a limited character. Again, though it cannot be denied that within a society judges do make law, they do so only in a qualified manner. In fact, judicial decisions or precedents only go to enrich the existing law by elucidating and defining it, rather than by creating totally new principles or rules of law.[52] Therefore, the use of the term 'legislative process', even in its widest possible meaning, does not properly cover either the customary growth of law or the judicial process which defines and settles what the law actually is; it should be used to indicate, generally speaking, only the conscious law-making activity which results in the written formulation of law, both of a 'particular' and 'general' character.

This written formulation of law would include:

1. *law-making by international conventions and treaties concerning*
   (a) fields hitherto unregulated or only partially regulated, *or*
   (b) codification of customary rules, *or*
   (c) attempts directed at the unification of private law, *or*
   (d) revision and amendment of treaties and conventions;
2. *unilateral and general declarations of international importance;* and
3. *'law-making acts' of international organizations.*

In relation to these norm-creating procedures the term 'international legislation' is justified on the basis of its extensive use by writers, and because it is also a convenient description of a process which occurs in practice.[53] It is not true that the term 'international legislation' must always be regarded as a 'metaphor'.

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52. See Brierly, J. L., *The Basis of Obligation in International Law* (1958), p. 213; Jennings, R. Y., "Judical legislation in international law" *Kentucky Law Journal* (1937-1938), vol. 26, p. 125. Arguments for and against 'judicial innovation' have been set out by Fitzmaurice in "Judicial innovation — its uses and its perils — as exemplified in some of the work of the International Court of Justice during Lord McNair's period of office", *Cambridge Essays in International Law* (1965), pp. 24-47. On the question of the creation/establishment of general legal norms by the courts, see generally Kelsen, H., *Pure Theory of Law* (1967), translation by Max Knight from the second German edition, pp. 250-256.

53. For a detailed study of the practice of States from this point of view, see Singh, N. N., *The Legislative Process in International Law,* unpublished doctoral dissertation, Cambridge University (1964).

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